IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1726 of 2004
To
FIRST APPEAL No. 1754 of 2004
with
FIRST APPEALS No. 2261 to 2295, 2365, 2372 to 2376, 2745 and 2748 of 2004.

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AMUL POTTERIES - Appellant(s)

Versus

EMPLOYEES STATE INSURANCE CORP - Defendant(s)

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Appearance : F. A. No.1726 to 1754 of 2004:

PS GOGIA for the appellants.
MR HEMANT S SHAH for the respondent.

F.As. No. 2261 to 2295 of 2004, 2365, 2372, 2373 to 2376, 2745 & 2748 of 2004:

MR HEMANT S SHAH for the appellant.

MR GOGIA for the respondents.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 21/12/2005

ORAL JUDGMENT

1. This group of appeals arises out of a judgment and order rendered by E.S.I. Court, Rajkot, on 8th April, 2004, in E.S.I. Applications No.1 to 48 of 1992.

2. First Appeals No.1726 to 1754 of 2004 are preferred by the factories-original applicants before the E.S.I. Court, whereas First Appeals No.2261 to 2295 of 2004, 2365, 2372 to 2376, 2745 and 2748 of 2004 are preferred by the Employees' State Insurance Corporation-original opponent before the E.S.I. Court.

3. For the sake of convenience, the original applicants are addressed to as “the applicants” and the original opponent is addressed to as “the opponent” in this judgment.

4. The applicants are engaged in the manufacture of roofing tiles at Morbi. They claim to be seasonal factories. By virtue of Employees' State Insurance (Amendment) Act, 1989, some amendments were brought into the Employees' State Insurance Act. By notification

dated 20th October, 1989, by the Government of India, the Central Government appointed 20th October, 1989 as the date on which the said amendments would come into force. By virtue of the said amendments, the definition as given in Section 2(12) of the Act came to be amended as under :-

> *"2(12) "factory" means any premises including the precincts thereof-*
>
> *(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or*
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> *(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on,*
>
> *but does not include a mine subject to the operation of the Mines Act, 1952 or a railway running shed;"*

Likewise, by virtue of the very amendment, Section 2, sub-section (19A) was introduced to define "seasonal

factory" as under :

> *"2(19A) "seasonal factory" means a factory which is exclusively engaged in one or more of the following manufacturing process, namely, cotton ginning, cotton or jute pressing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year-*
>
> *(a) in any process of blending, packing or repacking of tea or coffee; or*
>
> *(b) in such other manufacturing process as the Central Government may by notification in official Gazette specify."*

Upon that notification being issued, it is the case of the opponent-Corporation that notices came to be issued on 2.8.1990 to the applicants, which were not replied to. Second notice was issued on 8.1.1991, directing the applicants to contribute for the E.S.I. Scheme, which was also not replied to and then again on 4.2.1991 a reminder was sent, which was also not replied to by the applicants. A code number was given to each of the

applicants and they were required to contribute to the scheme, which they have not done.

4.1 The applicants, on the other hand, started making representations to the authorities in the Government and a decision came to be taken on 28.11.1991 to treat the factories enlisted in the list annexed thereto as seasonal factories. Later on, pursuant to the representations made, the applicants have been declared to be seasonal factories with effect from 3.6.1992 and are continued as such.

5. Because there was insistence on the part of the opponent-Corporation, the applicants approached the E.S.I. Court with applications under Section 75 of the Employees' State Insurance Act, 1948 (“the Act” for short). The E.S.I. Court, initially, granted ad-interim relief and then interim relief against the recovery of the contribution. However, finally, after considering the stand taken by the Corporation, the E.S.I. Court passed the impugned order, whereby it partly accepted the case of the applicants. It came to a conclusion that, by virtue of the notification of the Central Government, the amended operation of the Act has come into force with

effect from 20th October, 1989 and the applicants have been exempted with effect from 3.6.1992 and, therefore, for the period between 20th October, 1989 and 2nd June, 1992, the applicants are liable to make contribution to the Corporation and, therefore, they should make the payment within sixty days from the receipt of the order. The E.S.I. Court also directed that, if any amount is paid, the same should be given credit of. Aggrieved by the said judgment and order, the applicants have approached this Court with these appeals as per the details given above.

6. While passing the judgment and order, the E.S.I. Court observed that the question of awarding penalty or interest on late payment would not arise in facts of the case and, therefore, the opponent, being aggrieved, preferred the appeals, as detailed above, raising the contention that the E.S.I. court has no jurisdiction to waive the interest or not to award the same.

7. In light of provisions contained in Section 82 of the Act, an appeal can be entertained only if it involves a substantial question of law. Therefore, while admitting the appeals preferred by the applicants, this

Court framed following substantial questions of law for determination :-

> *"(1) Whether a seasonal factory would be covered and governed by the provisions of ESI Act?*
>
> *(2) If yes, whether the management can be held liable to pay contribution, if the medical facilities provided to the employees are inadequate?"*

Likewise, while admitting the appeals filed by the opponent, this Court framed following substantial questions of law :-

> *"(1) Whether it is open for the ESI Court not to award interest in light of provisions contained in Section 39(5) of the ESI Act and the Regulation 31(A) of the Employees' State Insurance (General) Regulations, 1950?*
>
> *(2) Whether it is legal for the ESI Court not to award compensation as contemplated under Regulation 31(C) of the Employees State Insurance (General) Regulations, 1950, once it holds that the employer is liable to pay contribution for the period between 1.1.1992 to 2.6.1992 as Regulation 31(C) came to be inserted by a notification dated 6th December,*

1991, which became effective from 1.1.1992?"

8. Learned Advocate, Mr. Gogia, contended that the Act would not be applicable to seasonal factories by virtue of provision contained in Section 1(4) of the Act. He submitted that the factories have been declared as seasonal factories as per order dated 28.11.1991 and an exemption is given by the State Government with effect from 3.6.1992, in exercise of powers under Section 87 of the Act. Mr. Gogia, therefore, submitted that the nature of work in the factory has not changed. The factories, therefore, were seasonal factories even prior to the order dated 28.11.1991. The notification by the Central Government only brings the amendments into force. If the factories were seasonal factories, they remained seasonal factories and the E.S.I. Court committed an error in directing to make the payment from 20th October, 1989 to 2nd June, 1992. It is contended by learned Advocate, Mr. Gogia, that no medical facilities were provided to the workers. The medical dispensaries were not manned with doctors for certain period and/or with less number of doctors than the sanctioned strength and, as such, no medical facility was available, which would justify insistence for contribution. Mr. Gogia,

therefore, submitted that the appeals of the applicants may be allowed.

9. Learned Advocate, Mr. Shah, appearing for the opponent-Corporation submitted that the applicants failed to respond to the notices given by the opponent under Section 85 of the Act, followed by reminders. Mr. Shah submitted that, by virtue of the amendment, all factories where ten or more persons were employed on any day of the preceding twelve months and in any part of which a manufacturing process was being carried on with the aid of power or any factory where twenty or more persons are employed or were employed for wages on any day of the preceding twelve months and in any part of which a manufacturing process is/was being carried on without the aid of power are covered under the definition of 'factory' and the case of each of these applicants falls within this criteria and, therefore, the E.S.I. Court cannot be said to have committed any error in coming to the conclusion that the applicants were liable to pay compensation for a period between 20th October, 1989 and 2nd June, 1992. However, Mr. Shah submitted that the observations made by the E.S.I. Court in paragraph 15 to the effect that no penalty or interest is required to be

awarded, followed by an order not awarding any interest or penalty is without jurisdiction. Mr. Shah submitted that, if provisions contained in Section 39(5)(a) of the Act read with Regulation 31-C are seen, the Courts have no discretion not to award interest or penalty in case of default in payment of contribution. He, therefore, submitted that, to this extent, the E.S.I. Court committed an error and, therefore, the appeals by the Corporation deserve acceptance.

10. This Court has taken into consideration rival side contentions. Before proceeding to discuss the merits of the case of either side, it would be appropriate to firstly examine certain provisions contained in the Employees' State Insurance Act, 1948 and the Employees' State Insurance (General) Regulations, 1950.

10.1 Section 1(4) of the Act provides that the Act shall apply, in the first instance, to all factors (including factories belonging to the Government) other than seasonal factories.

10.2 Section 2(12) of the Act defines 'factory' as

under :-

“2(12) “factory” means any premises including the precincts thereof-

(a) whereon ten or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on, or

(b) whereon twenty or more persons are employed or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power or is ordinarily so carried on,

but does not include a mine subject to the operation of the Mines Act, 1952 (35 of 1952) or a railway running shed;”

Sub-section (19A) of Section 2 defines “seasonal factory” as under :

“2(19A) “seasonal factory” means a factory which is exclusively engaged in one or more of the following manufacturing process, namely, cotton ginning,

cotton or jute pressing, decortication of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year-

(a) in any process of blending, packing or repacking of tea or coffee; or

(b) in such other manufacturing process as the Central Government may by notification in official Gazette specify."

11. It would be appropriate to record, at this stage, that the definition of the 'factory' quoted above came to be amended and introduced as such by virtue of amendments made in the Act with effect from 20th October, 1989, by virtue of notification of even date whereas the definition of 'seasonal factory' in sub-section (19A) came to be inserted, for the first time, with effect from 20th October, 1989.

12. It is, thus, clear that the law recognizes two categories of institutions, (1) factory and (2) seasonal factory. The definition of 'factory' came to be amended

and introduced, as such, as narrated above with effect from 20th October, 1989, whereas 'seasonal factory' was defined, for the first time, in 1989. By virtue of provision contained in section 1(4), it is clear that provisions of the law would not apply to seasonal factories. The question, therefore, would be whether the applicant-factories are factories or seasonal factories, as contemplated under the Act. In this regard, it would be appropriate to note that the applicant-factories are regarded and declared as seasonal factories by order dated 28.11.1991 by Labour Commissioner, State of Gujarat. It is nobody's case that nature of work in the applicants' factories has changed only with effect from 28.11.1991, which would convert them into seasonal factories. Differently put, it is nobody's case that prior to 28.11.1991, the factories were functioning in a manner which would not be covered in the definition of seasonal factories, meaning thereby that they were not working for more than seven months in a year.

12.1 Apart from this, it would be appropriate to note that the E.S.I. Court has also given a specific finding to the effect that the applicant-factories are seasonal factories and are functioning for less than seven months

in a year. This specific finding in paragraph 12 of the judgment of the E.S.I. Court is accepted by the E.S.I. Corporation. The Corporation has not challenged this aspect in the appeals preferred by it, though the contention regarding non-grant of interest and penalty is raised. In light of provision contained in Section 82(2) of the Act, an appeal shall lie only if a substantial question of law arises. When a finding of fact is not challenged, it attains finality and, therefore, the applicant-factories have to be and are accepted as seasonal factories.

12.2 Thus, there is no material to show that there is a change of period of work during the period between 1989 and 28.11.1991 and the period thereafter. The nature of work is the same and by order dated 28.11.1991, it is accepted that the factories are seasonal factories. Added to this is the fact that the Trial Court has also given a verdict to the effect that the applicant-factories are seasonal factories and, in light of section 1(4) of the Act, the provisions of the Act cannot be made applicable to seasonable factories.

13. Learned Advocate, Mr. Shah, has raised a

contention that Government has granted exemption in exercise of powers under Section 87 of the Act only with effect from 3.6.1992, whereas the applicant-factories fall within the definition of 'factory' with effect from 20th October, 1989 and, therefore, for that period, they are liable to pay contribution.

13.1 It is not possible to accept this contention for the reason that Section 87 contemplates investing power in the Government to grant exemption from payment of contribution by class of factories or establishments or class of factories or establishments in any specified area from the operation of the Act for a period not exceeding one year and may, from time to time, by notification renew such exemption for a period not exceeding one year at a time. This is provision relating to 'factory' or establishment and by no stretch of imagination can it be said that this term 'factory' would be applicable to a case of 'seasonal factory' when the law has contemplated, drawn and recognized distinction between factories and seasonal factories. The provision contained in Section 1(4) clearly makes a distinction between the two when it says that it applies to all factories other than seasonal factories and, therefore,

no notification by the Government would be necessary in respect of seasonal factories for exemption from payment of contribution. Section 87 cannot take in its sweep Seasonal Factories as Seasonal factory has been defined differently by the Act. The Government cannot enjoy the powers under Section 87 in respect of Seasonal Factories. Ordinarily, the term 'factory' would include seasonal factory, but when the law, from the beginning contemplates factories and seasonal factories separately and provides different definitions for each category, then section 87 cannot be read to include in its sweep seasonal factory when it speaks of granting exemption to factory of class of factory. No notification under Section 87 for exemption would be necessary in respect of Seasonal Factories in light of Section 1(4) of the Act. The contention is, therefore, devoid of merits.

14. It is, therefore, held that seasonal factories would not be covered under and governed by the provisions of the Employees' State Insurance Act, 1948.

15. The Trial Court committed an error in accepting the plea of the Corporation that, by virtue of 1989 notification, the applicant-factories are covered under

the sweep of the Act because by virtue of that notification, only the amendment in the Act is brought into force whereby definition of 'factory' came to be amended. The E.S.I. Court overlooked the aspect that the amendment also defines 'seasonal factories'. It also overlooked the fact that, by virtue of Section 1(4), seasonal factories would not be covered under or governed by the provisions of the Act. The E.S.I. Court came to a conclusion that the factories are seasonal but because of the notification, they are covered till they were exempted by notification under Section 87 of the Act, which was clearly an error on the part of the Trial Court in light of the above discussion.

16. So far as the second question raised while admitting First Appeals No.1726 to 1754 of 2004 is concerned, when this Court has come to a conclusion that the applicant-factories were seasonal and were not liable to pay contribution, the question whether the management would still be liable to pay contribution even if the medical facilities to employees are inadequate would remain only an academic exercise and, therefore, it is not required to be gone into. The question is kept unanswered.

17. So far as the questions framed while admitting First Appeals No.2261 to 2295 of 2004 preferred by the opponent-E.S.I. Corporation, which are in respect of not awarding interest and penalty on delayed payment of contribution or not awarding compensation as contemplated under Regulation 31-C of the Employees' State Insurance (General) Regulations, 1950, are concerned, they also become purely academic in view of he fact that this Court has found that seasonal factories are not covered under and not governed by the provisions contained in the E.S.I. Act and they also need not be answered at this stage and are kept unanswered.

18. In the result, the appeals by the applicant-factories would succeed. The E.S.I. Court committed an error in holding that the applicant-factories are liable to pay contribution with effect from 20th October, 1989 to 2nd June, 1992 and, therefore, the said order is hereby set aside. If any of the applicant-factories have made any payment in respect of contribution, penalty or interest or compensation, the same will have to be refunded by the Corporation to concerned factory.

18.1 So far as the appeals by the Corporation are concerned, they fail and are hereby dismissed without answering the questions framed therein. There will be no order as to costs in all these appeals.

[A. L. DAVE, J.]

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